Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WASANG TOMAS MOCK,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court commit reversible error when it deliberately delayed the execution of an arrest warrant against the Petitioner who was unrepresented by counsel until after he had provided testimony and did the court under these circumstances violate fundamental fairness and constitutional principles by failing to advise the Petitioner about his right to counsel and against self incrimination before allowing him to so testify.

2. Was the trial testimony given by the defendant under these circumstances involuntary and therefore inadmissible at his own subsequent trial.

3. Having allowed the Petitioner's testimony at the earlier trial to be heard by the jury did the trial court commit reversible error in violation of 18 USC 3501 by refusing to allow defense counsel to explore the circumstances of such testimony.

LIST OF PARTIES

The parties to the instant proceedings are Wasang Tomas Mock, Petitioner and the United States of America.

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To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States of America:

OPINIONS BELOW

The opinions of the District Court with respect to the issues herein were not officially reported, but are reproduced herein in Appendix's A, B & C.

The decision and Order of the United States Court of Appeals for the Second Circuit is not yet officially reported, but is reproduced herein in Appendix D.

JURISDICTIONAL GROUNDS

The Decision of the United States Court of Appeals for the Second Circuit affirming the Petitioner's conviction was rendered on February 17, 1994. The Petitioner is therefore timely filing this application for a Writ of Certiorari pursuant to Rule 13 of the United States Supreme Court Rules and the Jurisdiction of this Court is invoked pursuant to Title 28 USC § 1254.

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved in the case are the self incrimination clause and the due process clause of the Fifth Amendment to the Constitution and the Sixth Amendment to the Constitution involving the right to counsel.

RELEVANT STATUTES

The interpretation and application of 18 USC § 3501 is also involved in the instant petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner Wasang Tomas Mock was convicted along with two co-defendants Jorge Garcia and Raul Rodriguez of Title 21 USC § § 812, 841, 846 and Title 18 USC § 924 for allegedly participating in a crack and cocaine distribution enterprise and of weapons possession offenses. The Petitioner Mock was also convicted of perjury under 18 USC 1623 based upon

testimony he gave at an earlier trial of his co-defendants. The Petitioner was sentenced by the United States District Court for the Southern District of New York (Leisure, J.) to life imprisonment and a judgment was entered in that court on July 23, 1992. The judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit on February 17, 1994.

Co-defendants Garcia and Rodriguez were originally indicted along with one Pedro Valdez in December of 1990. Valdez subsequently turned government informer and entered into a cooperation agreement. On May 24, 1991 an arrest warrant was issued for the Petitioner Mock, alleging his involvement with Garcia and Rodriguez but the warrant was not immediately executed.

On July 23, 1991, a trial involving Garcia and Rodriguez commenced in the Southern District of New York before the Honorable Mary Johnson Lowe. During this trial the Petitioner Mock was called as a witness by the Defendant Garcia. At sidebar and in the robing room, the government informed Judge Lowe that there was a warrant for Mock's arrest. The court denied the government's request to execute the warrant immediately taking the position that executing the warrant would deprive the defendants of the benefit of Mock's testimony and that the defendants would have a "legitimate claim that the government prevented this man's testimony". (See Appendix A, A-3)

Judge Lowe thus stated:

> "I don't want him to be aware of the arrest warrant or any arrest take place before he has completed his testimony so as not to deprive the defendants of the benefit of his testimony".

> I don't want him to be aware that there is an arrest warrant for him until testimony is over. (A-9)

The attorney for the defendant Rodriguez, then made a general statement that the witnesses had been warned to hire an attorney although the attorney for the defendant Garcia appeared to dispute this and the record is unclear as to whether the reference was to Petitioner Mock or two other potential witnesses. (A-6)

The Assistant United States Attorney relying on the representations of defense counsel for Rodriguez informed the court that although Mock and other witnesses were not at that time represented by an attorney they had been told that "they might subject themselves to arrest if the came to court." (A-6)

The government eventually agreed to forestall Mock's arrest until Mock had

testified, and Judge Lowe made arrangements to have Mock arrested out of sight of the defendants or the jury once he had testified. (A-9, A-10)

Mock, who was not represented by counsel at the time, proceeded to testify on Garcia's behalf. He stated that he did odd jobs to support himself, denied being a drug dealer, had known Garcia for 20 years and had never known him to sell or use drugs, and had visited Garcia's apartment (which the government showed was the headquarters for the organization). Mock did testify that he was aware that there was "always a chance" of being arrested if he came to testify, but that he wanted to "clear his name."

At no time prior or during his testimony was Petitioner Mock ever advised by Judge Lowe that an arrest warrant had been issued for him and that

he had a right to obtain counsel or to exercise his right against self incrimination.

After his testimony Mock was immediately arrested outside the courtroom and at the ensuing second trial his testimony at the first trial[1] was admitted into evidence to support the perjury charges and to show that he had been in the apartment in which the drug operation was organized. In denying Petitioner's pre-trial motion to suppress, the trial court determined that there was no obligation to provide Miranda Warnings and that the testimony was not involuntary.

Further, during the trial, although the District Court admitted the

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[1] The original trial involving Garcia and Rodriguez at which Mock testified resulted in a mistrial after the jury deadlocked 11-1 for acquittal.

Petitioner's earlier testimony, the court did not admit the underlying circumstances under which the testimony was given, finding that Mock's lack of knowledge as to the arrest warrant was not relevant evidence.

The Second Circuit Court of Appeals while expressing the opinion that the district court "would have better exercised its discretion by ensuing that the petitioner was represented by counsel to caution him about the consequences of his testimony" determined that "ultimately Judge Lowe's actions were within her discretion" and that there was "no overriding obligation to inform him of the impending arrest warrant". With respect to the other issues the Second Circuit found that the Petitioner's lack of knowledge about the arrest warrant did not affect the voluntariness of his

testimony and that the District Court's decision to exclude evidence regarding the circumstances of the original testimony was not mandated under 18 USC § 3501 and was also not an abuse of discretion. (See Appendix D, A-70)

ARGUMENT

The Petition for a Writ of Certiorari should be granted because the issues involved are of a novel nature which have never previously been addressed by this court or apparently by any other court. The issues involve violations of concepts of fundamental fairness and constitutional principles as follows:

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DELIBERATELY DELAYING THE EXECUTION OF AN ARREST WARRANT FOR THE PETITIONER UNTIL AFTER HIS TESTIMONY AS A WITNESS AND BY FAILING TO ADVISE HIM ABOUT HIS RIGHT TO COUNSEL AND AGAINST SELF INCRIMINATION AND THE POSSIBLE CONSEQUENCES OF HIS TESTIMONY.

The Second Circuit below concluded that although several circuits have held that a District Court has the inherent discretion to warn a witness about his constitutional rights especially if the court perceives that a witness might incriminate himself. (Citing United States v. Arthur, 949 F2d 211, 215-216 (6th Cir., 1991); United States v. Silverstein, 732 F2d 1338, 1345 (7th Cir., 1984); cert denied 469 US 1111 (1985); United States v. Colyer, 571 F2d 941, 946 (5th Cir., 1978); United States v. Morrison, 535 F2d 223, 228 (3rd Cir., 1976), there was no overriding obligation to do so under the circumstances herein and that the trial court below was within its discretion to refuse to disclose to the Petitioner his impending arrest.

Under the circumstances herein, the instant matter cannot be treated as one which falls with the discretionary

authority of the court. Judge Lowe was specifically told that an arrest warrant for the Petitioner had been issued and that his arrest was imminent. She thereafter actively secured the postponement of the Petitioner's arrest until after his testimony and never took any steps to independently advise the petitioner about his 5th amendment rights or his right to independent counsel and to caution him regarding the possible consequences of his testimony. As the Second Circuit itself concluded:

> "we are troubled by the district court's choice to deliberately delay the execution of an arrest warrant to ensure a witness's testimony at trial. There is something vaguely inappropriate about the district judge arranging matters so that Mock's testimony on behalf of the defendants would not be jeopardized by execution of the arrest warrant. Although, Judge Lowe clearly had the interests of the

> defendants in mind, she disregarded the possibility that Mock's interests might need protection. (A, A-85)
>
> . . . . . .
>
> The District Court determination to withhold the information itself implicates concerns of fundamental fairness of the courtroom."

In determining her actions, Judge Lowe evidently chose to give priority to the Sixth Amendment Right of the Garcia and Rodriguez defendants over the Fifth and Sixth Amendment Rights of the Petitioner. Case law has clearly established the fundamental nature of the Fifth Amendment Right against self incrimination and that consideration for that right overrides Sixth Amendment concerns. Thus, in United States v. Goodwin, 625 F2d 693 (5th Cir., 1980), the Court aptly stated:

> "[A defendant has a Sixth Amendment right to compulsory process to obtain favorable testimony. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). But this right does not always assure a defendant of the testimony sought. A valid assertion of the witness' Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights. United States v. Lacouture, 495 F.2d 1237 (5th Cir., 1974); United States v. Gloria, 494 F.2d 477 (5th Cir., 1974).

See also, United States v. Moreno, 536 F2d 1042 (5th Cir., 1976); United States v. Rodriguez, 706 F2d 31 (2nd Cir., 1983.

In addition, as long as there was no effort to actively encourage Mock not to testify, advising him of the existence of the arrest warrant and his imminent arrest as well as his right against self incrimination would not constitute a Sixth Amendment violation of Garcia and

Rodriguez rights. Thus, in United States v. Smith, 997 F2d 674 (10th Cir., 1993), the Court stated:

> "At the outside we note that Webb[2] does not stand for the proportion that merely warning a defendant of the consequences of perjury demands reversal.
>
> United States v. Harlin, 539 F.2d 679, 681 (9th Cir.) cert. denied, 429 U.S. 942, 97 S. Ct. 362, 50 L.Ed. 2d 313 (1976). To the contrary, as a general rule a court 'has the discretion to warn a witness about the possibility of incriminating' himself or herself. United States v. Arthur, 949 F.2d 211, 215 (6th Cir., 1991). Judges and prosecutors do not necessarily commit a Webb-type violation merely by advising a witness of the possibility that he or she could face prosecution for perjury if his or her testimony differs from that he or she has given previously. United States v. Gloria, 494 F.2d 477, 484-85 (5th Cir.) (en banc), cert. denied, 419 U.S. 995, 95 S. Ct. 306, 42 L.Ed 2d 267 (1974)."

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[2] Webb v. Texas, 409 US 95 (1972).

See also, United States v. Blackwell, 694 F2d 1325 (D.C. Cir., 1982), United States v. Touw, 769 F2d 571 (9th Cir., 1985); United States ex rel Robinson v. Zelker, 468 F.2d 159, 162, footnote 5 (2nd Cir., 1972); cert denied, 411 US 39 (1973); United States v. Matthew, 417 F. Supp 813 (E.D. Penn., 1976), aff'd 547 F2d 1165 (3rd Cir., 1976); cert denied 429 US 1111 (1977).

Similarly, in United States v. Davis, 974 F2d 182 (D.C. Cir., 1992) at page 187 the Court observed:

> "The Sixth Amendment is not implicated every time a prosecutor or trial court offers advice regarding the penalties of perjury. See United States v. Blackwell, 694 F.2d 1325, 1334 (D.C. Cir. 1982). Indeed, there are circumstances when warnings about the possibility and consequences of a perjury charge are warranted - even prudent."

In the case at bar, Judge Lowe had she informed the Petitioner of the existence of the arrest warrant and informed him of his self incrimination rights could have adequately protected his rights without being subject to a Sixth Amendment claim by the defendants Garcia and Rodriguez. Having failed to do so, she created a situation where Mock was severely prejudiced. Although, Mock during his testimony indicated that he was aware that "there was always a chance of being arrested" that is not the same as being informed that a warrant had already in fact been issued and that arrest was imminent. In fact, his comment that there is "always a chance of arrest" is an indication of his total unawareness of the imminence of his arrest. To allow a determination as to the disclosure of this information to a

potential witness to fall within a discretionary area rather than a mandatory obligation is not only against fundamental concepts of fairness but against public policy involving the orderly administration of justice. In the case at bar, Mock's earlier testimony was heavily relied upon by the prosecution to establish his guilt of both the drug offenses and the perjury charges and it indeed contributed greatly toward his conviction. If a different judge in the exercise of his discretion had decided that disclosure and warnings were appropriate herein, Mock may never have testified and no conviction could have resulted. To hold in effect that the Petitioner's life time incarceration is dependent upon one judge's discretionary view on a matter involving an issue as fundamental as the exercise

of Fifth and Sixth Amendment Rights flies in the face of constitutional guarantees of due process of law and the fair, equal and uniform administration of justice. The need for uniform treatment has been recognized in a situation analogous to the case herein. In United States v. Jacobs, 547 F2d 772 (2nd Cir., 1976), the court recognized the need under its supervisory powers to adopt a uniform policy with respect to the obligation of a prosecutor to advise a potential witness before a grand jury that he is a target of the investigation. The Court pointed to its duty to avoid "uneven justice" and stated at page 775:

> "It is an important function of the administration of criminal justice to let our citizens know that equal justice is available to all."

Similarly, there is a recognition herein that there was a need to properly advise Petitioner Mock and to protect his interests. Under the circumstances where the court is aware of a witness' imminent arrest, the need for disclosure and advise regarding possible self incrimination and the need for representation by counsel must be viewed as being a mandatory obligation of the court whose violation requires a reversal of any ensuing conviction.

II. THE FAILURE TO DISCLOSE HIS IMMINENT ARREST AND TO RECEIVE HIS MIRANDA WARNINGS MADE MOCK'S TESTIMONY INVOLUNTARY AS A MATTER OF LAW.

The test of voluntariness as set forth by this Court is whether a confession is the product of an essentially free and unconstrained choice by its maker or whether his will has been

overborne and his capacity for self determination critically impaired. See Schneckloth v. Bustamonte, 412 US 218, 223-227 (1973); Culombe v. Connecticut, 367 US 568, 602 (1961); United States v. Olmstead, 698 F2d 224, 226 (4th Cir., 1983). In determining this inquiry, three factors have been deemed to be relevant: (1) The conduct of law enforcement officers, (2) the conditions under which the interrogation occurred and (3) the accused's background. See United States v. Anderson, 929 F2d 96, 99 (2nd Cir., 1991).

In the case at bar, the Petitioner's ability to make an informed decision was critically impaired by the delay of law enforcement officials in executing the arrest warrant and then by the purposeful withholding of information regarding the warrant by the court until after he had

given his testimony. Judge Lowe in effect abandoned any role of neutral magistrate and specifically determined that no arrest or information about the pending arrest would take place prior to the giving of testimony. She in effect assumed a law enforcement role by orchestrating the time of arrest.

In United States v. Olmstead, 698 F2d 224 (4th Cir., 1983), and in United States v. Okwnabua, 828 F2d 950 (2nd Cir., 1987), the Courts indicated that silence where there was a duty to speak would suffice to make a statement involuntary.

In the case at bar, there was both a legal and moral duty on behalf of the District Court Judge and the Government to immediately advise Petitioner of the existence of an Arrest Warrant. Federal Rules of Criminal Procedure, Rule 4 (c)

(1) states that a Warrant of Arrest shall" . . . command that the defendant be arrested and brought before the nearest available magistrate." Rule 5 (a) states that "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available Federal Magistrate..."

In the case at bar, the Petitioner and the Government were in front of a Federal Judge who had knowledge of an Arrest Warrant. Indeed, the Government wanted to execute the Arrest Warrant prior to Petitioner's testimony. Clearly, the implication of the above Federal Rules is that Judge Lowe had a legal obligation to have the Appellant arraigned on the complaint which was the basis of the warrant in her own court or,

without "unnecessary delay", send Petitioner Mock to the Magistrate where he would have been advised of his rights. Instead, material facts were withheld from the Petitioner by Judge Lowe.

The conclusion of the Second Circuit and Judge Leisure in the District Court that the Petitioner Mock was aware of the danger of arrest and testified anyway, and that thus the actions of Judge Lowe did not make a difference in the outcome are totally misplaced. No where in the record is there any indication that Mock was directly advised about his right to have an attorney and in fact there is a specific statement by defense counsel for Garcia that Mock did not have an attorney. (A-4) In addition, the comment by defense counsel for Garcia that he had talked to all of them and told them they might subject themselves

to arrest specifically is made in reference to two other potential witnesses not Mock (See A, A-6).

Indeed, in the Government's Memorandum of Law in opposition to defendants Pre-Trial Motions, the government admits that its earlier representation to Judge Lowe that the witness was aware that there was an arrest warrant out for him was based upon their interpretation of the statement made by defense counsel for Rodriguez with reference to two other witnesses. In any event, any comments made by defense counsel for Rodriguez and Garcia must be viewed as being suspect and in a conflict of interest situation since the interests of the other two defendants in having Mock testify is directly in conflict with his interest in being made aware of the dangers of his imminent arrest. Thus, the Petitioner cannot be

said to have voluntarily exercised his free choice to make a statement being fully aware of the actual circumstances which existed at the time.

In addition, since Judge Lowe had specifically arranged for his arrest immediately after the testimony including discussions with a Marshall as to how it would be effectuated, the Petitioner was in reality in custody when he commenced his testimony. As a reasonable person, Mock would have known that he was not free to leave if he had been properly apprised of all of the facts involving his imminent arrest. His failure to be informed of this situation in effect made any statements rendered in his subsequent testimony involuntary.

III. HAVING DETERMINED THAT MOCK'S TESTIMONY WAS VOLUNTARY, THE DISTRICT COURT SHOULD HAVE AT LEAST PURSUANT TO 18 USC § 3501 (a) ALLOWED EVIDENCE REGARDING THE CIRCUMSTANCES OF THE TESTIMONY AND INSTRUCTED THE JURY TO GIVE SUCH WEIGHT TO THE TESTIMONY AS IT FELT IT DESERVED UNDER ALL THE CIRCUMSTANCES.

The District Court below allowed Mock's testimony into evidence because it concluded that his statements were voluntary. (A-29). The second circuit affirmed this conclusion. 18 USC § 3501 (a) specifically provides that:

> "If the Trial Judge determines that the confession was voluntarily made it shall be admitted into evidence and the Trial Judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. "

Case law has made clear that although the statutory section does not afford the defendant a second determination of admissibility, it does allow for defense evidence to be presented so that the jury can then render its determination as to the circumstances under which the statement was made. It has further been established that given the legislative history of the enactment, it should be given a broad interpretation, and the statute covers any self incrimination statements made or given orally or in writing including testimony. See United States v. Lucchetti, 533 F2d 28 (2nd Cir., 1976) (dealing with Grand Jury testimony). Thus, in United States v. Barry, 518 F2d 342 (2nd Cir., 1975), the Court stated at page 346:

> "Although it does not afford the defendant a second determination of admissability, however, §3501 does unequivocally require a specific charge on the issue of voluntariness. It will be difficult to imagine a clearer imperative than the statutory direction that the judge shall instruct the jury."

With respect to the legislative history of the statute, the court observed at page 347:

> "There is the added safeguard that the jury must be instructed to give the confession or statement the weight they feel it warrants under all the circumstances. The committee feels that society is entitled to the use of confessions and incriminating statements which are admitted only after passing the test of both Court and Jury under the above-described safeguards. The Committee also feels that a civilized society could not be more fair to persons accused of crime, as the Constitutional Rights of defendant's in criminal cases would be fully protected and respected by the safeguards in this proposed legislation."

> (Senate Committee on the Judiciary, 1968 U.S. Code Cong. and Administration, News p. 2112)

That the defendant is entitled to present evidence irregardless of the trial judge's finding on voluntariness is further evidenced by the court's statement to that effect in United States v. Kampiles, 609 F2d 1233 (7th Cir., 1979), cert denied, 446 US 954 (1980), involving a non-custodial admission.

In the case at bar, the Petitioner had relevant facts to place before the jury concerning the withholding of information concerning the arrest warrant, the fact that he was unrepresented by counsel nor advised of his Miranda Rights as well as possibly erroneous information given to him by attorneys for the other defendants. Thus, defense counsel for the Petitioner argued in the District Court:

> "I have the right to argue to this jury the voluntariness of my client's statement to bring out all such circumstances in front of the jury, including Judge Lowe's statement that he should testify without being told there is a warrant there. I have a right to argue that under the statute. I have a right to bring up voluntariness under 3501 to the jury, your Honor." (See Appendix C, A-59)

The District Court's precluding Petitioner Mock from introducing the facts and circumstance surrounding his testimony at the "first trial" is even more egregious since the District Court Judge allowed the Government to offer evidence showing that his testimony was indeed "voluntary", i.e.: the testimony of Special Agent Serniak where he testified that Petitioner Mock was called on behalf of the Defense and testified.

(T 1520)[3] Further, the Government, in summation, argued that Mock testified under oath knowingly and intentionally. (T 1692, 1833)

It is respectfully submitted that once the District Court Judge made the determination of voluntariness, the Appellant had an absolute right to be allowed to place his prior testimony in the proper context so that the jury could give such weight to said statement as the jury felt it deserved under all of the circumstances. In U.S. v. House, 939 F2d 659 (8th Cir., 1991), the Court of Appeals held that "Once the court makes a preliminary determination that the confession is voluntary, than the only requirement is that the defendant be

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[3] T refers to Minutes of Trial commencing January 7, 1992.

allowed to place the statements in context". [See also, U.S. v. Bloom, 865 F2d 485 (2nd Cir., 1989); U.S. v. Nash, 910 F2d 749 (11 Cir., 1990)].

The conclusion of the Second Circuit that 3501 (d) justified the exclusion of the proffered defense evidence in the case at bar, is totally misplaced. That section was merely designed to establish that the procedural requirements of Section 3501 relating to a preliminary determination by the Court did not apply to certain situations. It has nothing to do with the mandate that requires that once the issue of voluntariness is in the case and is before the jury, defense counsel has a right to present evidence on the subject. Thus, when United States v. Colon, 835 F2d 27 (2nd Cir., 1987), which the Second Circuit relied upon is carefully examined, it is seen that the

case relied upon United States v. Bailey, 728 F2d 967 (7th Cir., 1984). The Bailey case however specifically stated that Section 3501 (d) "waived the need for prior judicial determination as to pre-custody spontaneous statements". Bailey never meant to apply 3501 (d) as the Second Circuit did herein.

Since, the Second Circuit, clearly reached an erroneous conclusion with respect to the meaning and applicability of Section 3501 (d), which may effect numerous other criminal trials, it is imperative that this Court grant the Petition for Certiorari so as to review and correct the situation.

In the case at bar, the government made extensive use of Mock's testimony, especially to establish his presence in the apartment on the date of the alleged drug transactions and to prove their

perjury counts. The Petitioner was thus severely prejudiced by the erroneous ruling of the District Court and the District Court's failure to allow the Petitioner to introduce evidence as to the circumstances of his testimony is clearly not harmless error and requires a reversal as a matter of law.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully Submitted,

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